cleared in early September. CapRock continues to monitor the report daily and has weekly status calls with SBC's LSC operations. It is worth noting that these orders are not included as misses in SBC's performance measurements because these types of errors occur after orders have been counted for inclusion. Accordingly, CapRock is not confident that SBC has systems in place to handle commercial order volumes or will be able to scale appropriately in Oklahoma or Kansas.

CapRock Customers Lose Dial Tone because of SBC OSS/BackOffice Errors CapRock has experienced several situations where customers have lost dial tone when CapRock attempts to convert customers to UNE-P. This has been due to SBC OSS/back office problems.

Case 1: CapRock's customer lost dial tone 2 times because of SBC errors. CapRock sent an order to SBC for UNE-P conversion on May 2, 2000. CapRock received a FOC on May 2, with a due date of May 5. When the disconnect order was executed on August 16, the customer lost service. The "N" (New Connect) order was not executed, because it was in error status since May 5. After CapRock escalated the problem to a SBC vice president, service to this customer was re-established by SBC on August 17. This customer has demanded that CapRock write a letter to each of its customers explaining the situation and apologizing for the problem. The owner is also seeking damages for lost revenue due to the service outage.

In the case of this customer, CapRock had to escalate up to the VP Level to get the proper attention. The SBC VP's escalation representative expressed surprise that it took six and a half-hours to get the customer back in service. This occurred at 3pm on Thursday, August 17th; 22 hours after the customer was out of service from the SBC conversion order not working properly.

On Friday August 18th, the same customer again lost dial tone because the original order submitted was still pending, in error status. CapRock advised SBC that the customer order was still in error status. CapRock sought to avoid any confusion that might cause an out-of-service condition and received assurance from SBC. On August 22 the customer reported that four more of his lines were out of service. SBC was advised and restored service within three hours, after a phone call from the CapRock. After an investigation, SBC reported that this outage was caused by human error: the "D orders" that were sent to the Central Office Frame group on August 17 were left at the Central Office, where an employee took them by mistake. Thinking the lines were to be permanently disconnected, the employee disconnected the customer's hunting sequence again on the 22nd. Service was restored later that morning of the 22nd.

On August 28 SBC reported to CapRock that the customer's August 16 outage was caused by a change in the original order; the due date was changed from May 5 to July 20 for unknown reasons. The "C order" was executed on July 20, and the number was ported on July 21; however the "D order" caused the account to go into a "Lock-out stage". According to SBC's investigation, the execution of the "D orders" prevented the sequencing of the hunting line from correctly processing; this caused the orders to go in to "Lock-out status." SBC further reported that the order was then sent to "SORD." However, the SBC SORD group cannot type to completion, and it remained in origination status until August 16, when the customer was taken out of service.

SBC advised CapRock that even if SBC was in error and a business with 8 to 16 lines was out of service, it is not SBC's policy to order an after-hours service call to restore service to the business. According to a SBC manager, correction of such a problem would involve 6 to 7 departments, and SBC will not call out all departments for a business with so few lines. SBC advised CapRock that every CLEC has these types of errors and SBC will work to resolve these incidents on a case-by-case basis, but a complete remedy can only be achieved in theory through regulation. In investigating this customer's out-of-service situation, an SBC employee advised CapRock that the failure of C, N, & D orders to process correctly may cause an out-of-service condition to the CLEC customer.

Case 2: CapRock submitted an order for UNE-P conversion on May 15, 2000; FOC was received May 15 with a due date of May 17. The D order was worked on August 17; the N order remained in Error status from May 17. As a result, the customer lost service on August 16. SBC through escalation procedures on August 17 restored the customer's service resulting in 18 hours of lost service.

Case 3. CapRock submitted an order for UNE-P conversion on July 21, 2000. The customer lost service on August 24. All but one D order and N orders were worked on August 24, but the C order remained in Origination status with a due date of July 25.

These situations are symptomatic of deficiencies in SBC's ability to integrate its OSS and back office functions in Texas, and therefore, Oklahoma and Texas, as well. Accordingly, SBC has not shown nondiscriminatory access to these functions in Oklahoma or Kansas.

III. SBC HAS NOT IMPLEMENTED ACCESS TO LOOP PREQUALIFICATION INFORMATION

The Commission must evaluate SBC's compliance with the loop prequalification requirements established in the *UNE Remand Order*. The *UNE Remand Order* required ILECs as part of the OSS pre-ordering process, to provide CLECs with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the CLEC can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the CLEC intends to install.[94] It is not clear that SBC has made loop prequalification information available to CLECs or developed or proposed performance metrics to satisfy this key requirement.

Significantly, SBC's prequalification database provides a "green, yellow or red" indicator which is a graphical summation of the data contained in the database.[95] The Commission has already determined that the database used by SBC to provide loop qualification information would not meet the nondiscrimination requirement because it "indicates only whether a loop falls into a 'green, yellow, or red' category" and does not provide access to the underlying loop information.[96] At the pre-ordering stage, CLECs need loop qualification information to identify the physical attributes of the loop plant (such as loop length, the presence of analog load coils and bridge taps, and the presence and type of digital loop carrier systems), because it enables carriers to determine whether the loop is capable of supporting varieties of DSL and other advanced services.[97]

The Commission did not evaluate SBC's compliance with *UNE Remand Order* requirements in connection with SBC's Texas 271 application submitted April 5, 2000, because

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94 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd. 3696, 3885 (1999).

95 Chapman Affidavit, paras. 22, 24-28. *See also*, Nolan/Smith Affidavit, para. 141.

96 15 FCC Rcd. at 3886.

97 *Id.* at 3885.

those requirements were not in effect when that application was filed, but must do so here. In the *Texas Order*, the Commission stated that it would "evaluate BOC compliance with the regulatory requirements in place on the date of its section 271 filing," and did not consider whether SBC complied with the new loop requirements in the *UNE Remand Order* that took effect on May 18, 2000.[98] Those requirements are currently in place and the Commission has already acknowledged that access to loop prequalification information is critical to CLECs' ability to compete successfully. Nor is it clear that provisions of designed loop information instead of actual loop information complies with the Commission's rule.[99] Thus, the Commission should reject SBC's application for interLATA authority in Kansas and Oklahoma solely on the basis of SBC's failure to provide CLECs with the required loop prequalification information established in the *UNE Remand Order*. Moreover, the Commission should consider prohibiting SBC from providing DSL services until it provides an adequate demonstration of being able to provide nondiscriminatory access to loops, a step recently taken by the Wisconsin Public Service Commission.[100]

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98 *Texas Order*, para. 165.

99 See Affidavit of Elizabeth Ham, p. 62.

100 Investigation of the Digital Services and Facilities of Wisconsin Bell, Inc., 6720-TI-154/7825-TI-100, Final Decision and Certificate, p. 24.

IV. SBC's APPLICATION MUST BE DENIED BECAUSE SBC REFUSES TO MAKE AVAILABLE AS A UNE PACKET SWITCHING CAPABILITY CONTAINED IN THE PROJECT PRONTO NETWORK ARCHITECTURE

A. SBC's Network Contains Packet Switching Functionality Subject to Unbundling

The Commission's *UNE Remand Order* requires SBC to provide packet switching as an unbundled network element in specific circumstances. The Commission stated that incumbent LECs must provide access to unbundled packet switching "if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services[.]"[101] Under Section 271 of the Act, before SBC may obtain authority to provide in-region interLATA services, SBC must provide "nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)."[102] In order to show compliance with an item on the competitive checklist,

> a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.[103]

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[101] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*") at para. 313.

[102] 47 U.S.C. § 271(c)(2)(B)(ii).

[103] *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Texas,* Memorandum Opinion and Order, FCC 00-238, CC Dkt No. 00-65 (rel. Jun. 30, 2000) at para. 52.

Therefore, in order to qualify for Section 271 authority an RBOC must provide packet switching as a UNE in accordance with the Commission's rules.

SBC contends, however, that it is unable to provide packet switching as a UNE because "[a]ll packet switches for advanced services owned by SBC that had the potential to be unbundled were transferred to its advanced services affiliate prior to the effective date of the *UNE Remand Order*. As a result, SBC states that it has no packet switching for advanced services within its existing network to unbundle[.]"[104] However, SBC also acknowledges that its Broadband Service offering that it makes available to CLECs as a "voluntary commitment" in connection with Project Pronto contains packet switching functionality. In fact, SBC specifically requested and obtained authority from the Commission in connection with Project Pronto to retain ownership of the OCD in the central office and ADLU cards [in remote terminals] rather than transfer these to its affiliate, as otherwise required under the SBC/Ameritech merger conditions.[105] In short, SBC's statement that it does not have packet switching functionality that could be unbundled is incorrect, and contradicted by its own statements. SBC's statements that is has no packet switching functionality that could be unbundled is little more than game playing and another manifestation of its overarching regulatory goal to retain, but immunize from unbundling obligations, next generation networks. The Commission should reject this effort. Simply stated, as long as SBC possesses a packet

[104] Chapman Affidavit, p. 49.

[105] *In re Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, FCC oo-336, CC Dkt. No. 98-141, ASD File No. 99-49 (rel. Sep. 8, 2000) ("*Project Pronto Order*").

switching functionality it is subject to unbundling in accordance with the Act and the Commission's rules.

Because SBC disclaims any responsibility to make packet switching available as a UNE, the Application presents a *prima facie* violation of the Commission's UNE rules disqualifying SBC from Section 271 authority. The Application may, and should be, rejected for this reason alone.

B. SBC Attempts to Interpret Away the Circumstances Under Which It Must Make Packet Switching Available as A UNE

It is also worth noting that SBC pretends that the circumstances set forth in the Commission's rules that will trigger its obligation to provide packet switching as a UNE will never occur. The Commission certainly has qualified ILECs' obligation to provide the packet switching network element on an unbundled basis, but SBC interprets those circumstances so narrowly that they would essentially deny the packet switching network element.

SBC first contends that because its deployment of fiber facilities in connection with its Broadband Service is an overlay, rather than a replacement of copper facilities, it is not required to provide packet switching on an unbundled basis.[106] Neither the *UNE Remand Order*, nor can the Commission's rules implementing the *UNE Remand Order* be read to impose an exception to the packet switching unbundling requirement where SBC deploys fiber in addition to copper facilities.[107] The language in both clearly contemplates that copper facilities would exist

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[106] Chapman Affidavit at 56.

[107] *See* 47 C.F.R. § 51.319(c)(3)(B).

alongside fiber facilities. If the packet switching unbundling requirement were limited to situations where the ILEC replaced copper facilities with fiber optic facilities, the requirement that there must be no spare copper loops would always occur, rendering it useless as a criteria. Further, as discussed, adopting SBC's position on this issue would place significant portions of SBC's network out of the reach of competitors. For example, deployment of facilities into new areas where no facilities presently exist would not be replacing copper facilities, but surely failure to allow competitors access to those facilities would deny competitors entry into the packet switching market for customers served by those facilities.

SBC also misconstrues the precondition to offering the packet switching UNE concerning unavailability of copper loops.[108] The test is not only whether spare copper loops are available to CLECs, but also whether those copper loops provide CLECs with the ability to provide the same level of quality for advanced services that the incumbent provides over its packet switching facilities. Therefore, the mere presence of spare copper loops to provide an xDSL service is insufficient to satisfy the requirement if the incumbent provides an advanced service superior in quality to the service provided over those spare copper loops. Further, SBC is essentially seeking a blanket waiver of its unbundling requirement for packet switching by pledging to make copper loops available to CLECs. Nothing in the *UNE Remand Order* authorizes such a blanket waiver. Instead, under the criteria established in the *UNE Remand Order*, whether SBC must provide packet switching on an unbundled basis must be determined on a case-by-case basis. SBC's attempt to rewrite the terms of the *UNE Remand Order* indicates an unwillingness to meet

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[108] Chapman Affidavit at 56.

its Section 271 unbundling obligations. In any event, SBC has not made an unqualified promise to make copper loops available. In Project Pronto, SBC only agreed to make loops available for three years, and reserved the right to remove loops in some circumstances.[109] This, there may be situations where no loops are available and the criteria for SBC to avoid its packet switching unbundling requirement could not be satisfied.

Third, SBC suggests that the packet switching facilities potentially subject to an unbundling requirement must be used by SBC to provide voice service.[110] Again, nothing in the *UNE Remand Order* limits SBC's unbundling requirement in this way. Indeed, packet switching is used primarily to provide data services. Under SBC's view, the packet switching unbundling requirement would be rendered useless except in those narrow instances, if they existed at all, where packet switching was used to provide voice services. Again, SBC's cramped reading of its unbundling obligations constitutes a violation of Section 271.

IV. IF THE COMMISSION GRANTS THE APPLICATION, SUPPLEMENTAL COMPETITIVE SAFEGUARDS MUST BE ESTABLISHED

A. Strengthened Backsliding Measures

The Commission considered backsliding measures in both the New York and the Texas proceedings as part of its public interest analysis.[111] In New York and Texas the Commission found that the performance monitoring and enforcement mechanisms in place "in combination with other factors" provided sufficient assurance that the local market would remain open after

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[109] *Project Pronto Order,* paras. 14, 18.

[110] *Id.* at 57.

Bell Atlantic received Section 271 authorization.[112] In New York the Commission relied heavily upon the fact that the performance monitoring and enforcement mechanisms contained the following attributes:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier to carrier performance
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate.[113]

In New York the Commission found that the fact that there was a total of $269 million in potential bill credits at risk on an annual basis there was a "meaningful incentive for Bell Atlantic to maintain a high level of performance."[114] The Commission based its conclusion, in part upon the fact that the $269 million represented approximately 36 percent of the net return of

111 *New York Order* at 429-43; *Texas Order* at 422-30.

112 *New York Order* at 429.

113 *Id.* at para. 433.

114 *Id.* at para. 436.

$743 million reported for 1998 in New York. The Commission accepted the New York plan because it found that it was "reasonably self-executing."[115]

In the Texas 271 Order the Commission relied upon reasoning and analysis similar to that it had used in New York in finding that SBC's performance remedy plan provided assurance that the local market would remain open after SBC received interLATA authority. As in New York, the Commission found that the total of $289 million in potential penalties placed at risk, on an annual basis "represents a meaningful incentive for SBC to maintain a high level of performance. As in New York this figure represented approximately 36 percent of SBC's net return.

In the instant application, SBC states that it has in place "performance measurements covering all aspects of [the] provisioning of services and facilities to CLECs", that the measurements were developed in a collaborative process, and that it "has proposed a performance penalty plan that mirrors the Texas plan in all material respects.[116] Further, it alleges that SBC's region-wide data collection methods and procedures have passed an independent third-party analysis under the direction of the Texas PUC.[117] SBC states that its proposed payment plan involves both self-executing payments to the Kansas and Oklahoma state treasuries as well as to CLECs and the plan includes a two tiered payment scheme and increased

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[115] *Id.* at para. 441. While the Commission recognized that any "exceptions" or "waiver" process could effectively destroy the self-executing aspect of any plan it found that the three exceptions/waivers allowed in New York appeared to be generally reasonable and the New York Commission had stated that it would consider waiver requests only in "limited, extraordinary circumstances."

[116] Brief at 63-64.

[117] *Id.* at 66.

assessments for substandard performance on certain measures affecting nascent services.[118] The plan, according to SBC puts $45 million at risk during the first year in Kansas and $44 million at risk in Oklahoma, which SBC alleges is "virtually the same liability" - measured as a percentage of net return - that was approved in Texas and New York."[119] SBC generally argues that because the FCC approved the Texas performance measures and performance penalty plan the Commission must do so in this case.

For the reasons discussed below, the Commission should reject the Kansas and Oklahoma proposed performance penalty plan and establish significantly stronger backsliding measures. First, it is not at all clear that the Kansas and Oklahoma penalty plans satisfy the requirements articulated by the Commission for the plans accepted in New York and Texas. Second, experience has shown that, in fact, the approach accepted in New York and Texas is not sufficient to deter backsliding. The Commission is well aware that there has been significant backsliding in New York. Therefore, even if the Oklahoma and Kansas plans were as strong as New York or Texas, the Commission should recognize that those plans were not sufficient and stronger plans should now be adopted.

1. The Proposed Plans for Oklahoma and Kansas Are not Necessarily Self-Executing and the Potential Liability is not Meaningful under the Circumstances

As noted above the Commission accepted the backsliding provisions for New York and Texas based in large part upon its finding that the potential liability provided a meaningful and

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118 *Id.* at 67.

119 *Id.*

significant incentive to comply with the designated performance standards and upon its finding that the provisions were self-executing. It is not at all clear that either of these standards are met in the Kansas and Oklahoma plans.

SBC's argument that the proposed potential liability provides a meaningful and significant incentive to comply is based entirely upon the fact that the potential liability in New York and Texas was approximately 36% of the "net return" of each company, which SBC claims is the same percentage in Kansas and Oklahoma. However, the penalties that SBC touts not only have yearly caps but monthly caps that are quite low. The monthly cap in Kansas, for example, is $3.75 million. With a monthly cap that is that low, it would be quite easy for SBC to obliterate all competition in Kansas within several months (and for only about 10 million dollars). That is an extremely small sum for a business the size of SBC. While McLeod USA and CapRock recognize that the Texas performance remedy plan also contained monthly caps, the Commission did not expressly consider those caps. And, in any event, the existence of monthly caps in Kansas and Oklahoma, where competition is clearly less established than in Texas, could have a much greater detrimental effect on competition.[120]

In addition, the automatic penalties come into play only if SBC fails to meet the articulated standards for three months in a row. Thus, it would be entirely possible for SBC to provision services to competitive providers at a rate that is far from parity for two months and then meet the performance standards for one month and then start the process over again by

[120] The plan also contains a Single CLEC monthly cap of $470,000 in Kansas and $459,000 in Oklahoma. Such a cap is particularly inappropriate in any state where there is not a competitive presence by a large number of CLECs. The incumbent could "pick off" its competitors one by one for a relatively small amount of money.

failing to meet the performance measures for the next two months and, again, on the third (or sixth) month improving performance significantly again. If SBC were to do that it could easily destroy the nascent competitive market in Oklahoma and Kansas and never pay a penny in fines.[121]

It is also not clear that the penalties will be "self-executing." The performance remedy plan in both Oklahoma and Kansas provide that SBC will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SBC containing the terms of [the performance remedy plan]." Therefore, it is not entirely clear that the supposedly self-executing remedies will in fact become applicable.

Further, while SBC argues that the performance remedy plan in Kansas and Oklahoma mirrors the Texas plan in all material aspects, it is not clear that that is correct. The plans appear to be far from identical. For example, there appear to be differences in the "Z-test", which is used to evaluate the difference between the two means (SBC and CLEC), or percentages, or the difference in the two proportions reported. In addition, the Texas provision relating to when SBC would be liable for payment of damages appears to be somewhat more self-executing or more likely to become effective than the provisions in Kansas or Oklahoma (compare Section 5.5 of the Texas Performance Plan and Section 5.5 of the Kansas plan).

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[121] It is already clear that SBC's performance seems to go up and down significantly depending upon the month. There are a number of performance measures for which SBC states that it has met the applicable standard for one or two of the past three months. If a BOC is allowed to bounce between acceptable and unacceptable performance the effect on the CLECs could be disastrous with no penalty ever accruing to the incumbent.

Finally, the New York Commission had stated that it would consider waiver requests of penalty provisions only in "limited, extraordinary circumstances." While the exceptions and waivers that are proposed in Kansas and Oklahoma are similar to those in New York, in the instant case there does not appear to be a similar assurance by wither the Kansas or Oklahoma commissions that the exceptions and waivers would be considered only in "limited, extraordinary circumstances." Therefore, it is far from clear that the performance penalties would, in fact, be imposed in Kansas and Oklahoma.

2. Experience has Shown that the New York Backsliding Measures Did not Prevent Significant Backsliding

As the Commission knows, experience has shown that the backsliding measures that were accepted in the New York proceeding have proven to be insufficient. On February 7, 2000, this Commission commenced an investigation into Bell Atlantic New York's potential violations of Section 271 in connection with lost or mishandled orders submitted by its local service competitors. The Commission found:

> Evidence submitted by Bell Atlantic in this investigation suggests that Bell Atlantic's performance in providing order acknowledgments, confirmation and rejection notices, and order completion notices for UNE-Platform local service orders deteriorated following Bell Atlantic's entry into the New York long distance market. Data submitted by Bell Atlantic indicates that the problem appears most acute for January and February of this year. Specifically, Bell Atlantic indicates that it received trouble tickets from competing carriers in November 1999 regarding 33,000 orders; 60,000 in December 1999, and more than 86,000 in January 2000. For the first eleven days of February

> 2000, Bell Atlantic reports receiving trouble tickets regarding another 48,000.[122]

The number of affected orders was astounding. Based on this terrible OSS performance, Bell Atlantic was required to enter into a consent decree with the Commission and make a contribution of $3,000,000 to the U.S. Treasury and the NY PSC had ordered Bell Atlantic to make $10 million in rebates to competitors because of electronic ordering problems.[123] Thus, the Commission simply erred when it reached its "predictive judgment" with respect to the Bell Atlantic-New York application that the backsliding provisions adopted there would be sufficient to deter backsliding.[124] Even assuming that the current approach is possibly sufficient to prevent continuation of long lapses in compliance, it is manifestly not sufficient to prevent backsliding in the first instance since this has occurred. And, this backsliding causes immediate, long lasting harm to CLECs even if it is ultimately corrected. Therefore, the Commission should adopt measures that deter backsliding from occurring in the first place.

Further, strengthened backsliding measures are appropriate for this Application because there is so little experience on which to base an evaluation of SBC's performance in Oklahoma and Kansas. For example, a review of the Dysart affidavit illustrates that there are a significant

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[122] Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to provide In-Region, InterLATA Service in the State of New York, Order, FCC 00-92, 15 FCC Rcd. 5413 at ¶ 7 (March 9, 2000).

[123] *FCC Decides BA Has Satisfied OSS Requirements in N.Y. State*, Communications Daily, Vol. 20, No. 120, June 21, 2000 at p. 2.

[124] See *New York Order* at ¶ 433. The Commission itself recently released information that clearly demonstrates that Verizon's performance on some of the major market opening measures has declined since Verizon was granted Section 271 authority in New York. *See March 9, 2000 Order*. The Commission should also recognize that the backsliding in relation to the New York 271 is not an isolated occurrence. There were a number of commitments that Bell Atlantic made in order to secure approval for its merger with NYNEX with which the merged companies did not comply, including commitments relating to the adoption of uniform OSS interfaces.

number of performance measures for which there have been insufficient CLEC orders to result in meaningful performance assessments, including the key measure of provision of unbundled loops.[125] Obviously, extensive evidence of compliance over a long period of time provides a higher degree of confidence of future performance than does little data, and that over a brief period of time. Allegiance submits that where, as here, there is little information on which to base an evaluation of performance, the Commission should establish significantly greater performance penalties. Moreover, where there is a lesser degree of competition, as in Kansas and Oklahoma, the impact of backsliding may be more harmful to competition than where there is robust competition. The extent of competitive entry in Kansas and Oklahoma appears to be minimally sufficient to warrant evaluation of the Application under "Track A," but it is hardly sufficient to give the Commission great comfort that competitive entry is strong enough to withstand poor performance by the incumbents.[126] Accordingly, the Commission should establish strengthened backsliding measures.

3. Proposed Additional Backsliding Measures

Competitive carriers have previously asked the Commission to adopt strengthened backsliding measures, but the Commission refused because it believed that it had sufficiently set

[125] *See, e.g.* Breif in Support of Application at 95 ("there were insufficient orders to allow statistically significant results for any loop type over the past three months").

[126] The application attempts to argue that the level of competition in both Kansas and Oklahoma is similar to the level of competition in Texas. See Affidavit of J. Gary Smith and Mark Johnson at 7. However, the applicants readily admit that their comparison is between the level of competition in Kansas and Oklahoma as of the time of the filing of the application and the filing of the FIRST application in Texas, almost a year ago and more than four months before the filing of the Texas application that was eventually granted. In addition, in Oklahoma, the number of CLEC access lines is below the number of access lines reported for Texas in all three of the categories reported and in Kansas the number of lines is below the number for Texas in one the three categories.

forth its views on backsliding in the New York 271 proceeding.[127] Now that those views have proven to be overly optimistic that Commission should adopt stronger backsliding provisions.

The Commission should adopt the following provisions:

1. Any penalties should be payable if the incumbent fails to meet the applicable standards for three months in a row or for three out of five months.
2. Monthly caps should not be limited to 1/12 of the yearly cap. Rather they should be limited to ¼ or 1/3 of the yearly cap.
3. There should be no single CLEC caps
4. There should be a several-tiered approach whereby the remedies would be increased to ensure that the pressure to incent the RBOCs to comply with the 271 obligations and commitments increase with time.

While McLeod USA and CapRock continue to believe that the Application should not be granted, adoption of these additional backsliding measures would at least give competitive carriers and the public adequate assurance that the markets in Oklahoma and Kansas will not become more closed in the future

B. The Commission Should Establish A Fresh Look Opportunity

In the *Pricing Flexibility Order*, the Commission stated that "[t]o the extent the [ILEC] can lock in the larger business customers whose traffic would economically justify the

[127] See Petition of Allegiance Telecom, Inc., In re the Development of a National Framework to Detect and Deter Backsliding, Rm 9474, Order (released Jan. 19, 2000).

construction of new facilities, the [ILEC] can foreclose competition ..."[128] and that "[a]n incumbent can forestall the entry of potential competitors by 'locking up' large customers ..." In the *Bell Atlantic 271 Order,* the Commission further recognized that the application of penalties when a customer terminates a contract in order to take service from another provider could, in certain circumstances, be unreasonable or anticompetitive.[129] The Commission determined that the termination penalties brought to its attention in that proceeding "on their face" would not result in a carrier's noncompliance with the competitive checklist.[130] However, the Commission determined that "issues raised by parties in this proceeding relating to contract termination liability are more *appropriately resolved* in the context of a petition for declaratory ruling filed by KMC Telecom, Inc.,[131] and we thus decline to resolve the issue in this proceeding." [132]

Since that determination, CLECs continue to experience difficulties in providing competitive services because ILECs impose significant termination liability on customers.[133] In many cases, these termination penalties were imposed before the customer had any competitive

[128] *Access Charge Reform, et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, CC Docket No. 94-1, CCB/CPD File No. 98-63, CC Docket No. 98-157, (rel. August 27, 1999) (*"Access Charge Reform Order"*), ¶ 79.

[129] Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order, (rel. December. 22, 1999), ("Bell Atlantic 271 Order"), ¶ 390.

[130] Bell Atlantic 271 Application at ¶ 386.

[131] The Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition, KMC Telecom Inc. Petition for Declaratory Ruling, CC Docket No. 99-142 (filed April 26, 1999).

[132] Bell Atlantic 271 Order, ¶ 390.

[133] See Letter from KMC Telecom Inc., CC Docket No. 99-142, February 8, 2000; Letter from Mpower Communications Corp., CC Docket Not. 99-142, June 5, 2000.

choice. In addition, ILECs substantially increased use of termination penalties right before and after passage of the Telecommunications Act of 1996 in order to protect against CLECs offering their customers better service at lower prices.[134] Accordingly, as recognized by the Commission, these termination penalties are inimical to the pro-competitive goals of the Act and are contrary to the public interest. Further, a BOC that employs unreasonable termination penalties has not adequately opened its markets to competition and is disqualified from interLATA entry.

Because the Commission has so far failed to act on the KMC petition, as it said it would do, McLeod USA and CapRock urge the Commission to take advantage of this Application to establish a fresh look opportunity for SBC customers in long term service contracts, if the Commission grants the Application. This will remove termination penalties as a barrier to entry in Oklahoma and Kansas. Specifically, the Commission should determine that termination penalties equivalent to the full tariff or contract price are unreasonable and have the effect of prohibiting the provision of telecommunications service by competitors to customers.

V. SBC HAS NOT PROVIDED ADEQUATE NOTICE OF SECTION 271 ISSUES IN OKLAHOMA AND KANSAS

SBC has not complied with some of the substantive and filing requirements that the Commission articulated in its *Section 271 Public Notice* of September 28, 1999.[135] There, the Commission required all applicants to submit "a statement describing the efforts the applicant has made to meet with likely objectors to narrow the issues in dispute and the results of those

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[134] See e.g. Letter from Mpower Communications Corp., CC Docket No. 99-142, June 5, 2000 citing GTE Florida's Responses to Staff's Data Request On Fresh Look Policy, Docket No. 980253-TX, Florida Public Service Commission, filed April 29, 1999, "Number of Outstanding Eligible Tariffed Term Plans by Quarters;" BellSouth Response to Staff Fresh Look Data Request, Docket No. 980253-TX, Florida Public Service Commission filed April 30, 1999, "Number of Outstanding Eligible Tariffed Term Plans by Quarters."

efforts." The Commission stated that the statement could either be in the Brief in Support or filed separately from the application but not later than five days after the filing of the application.[136]

SBC has responded to this requirement with a footnote on page 3 of its brief in support of the Application that simply states "[T]hroughout the course of these proceedings, SBC has continued to work with all interested parties (including the KCC, the OCC, DOJ, and competing carriers) in the context of formal proceedings, informal collaborations, and individual discussions to attempt to resolve disputed issues." This statement is clearly not sufficient to satisfy the Commission's requirements. The Commission's requirements articulated in the Public Notice and in the subsequent New York Proceeding clearly were adopted in order to ensure that all issues would be aired as soon as possible in the Section 271 process and to ensure that there is no undue advantage for the applicant which could otherwise preempt the ability of interested parties to respond to arguments that the applicant could raise in response to an issue that was existent but not raised until the filing of Comments by interested parties. As the Commission has noted many times it has a statutory obligation to rule on Section 271 applications in 90 days. It is imperative therefore, that the review process be as efficient and fair as possible. The fact that SBC has not attempted to advise the Commission of the issues that it believes may be raised may

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[135] *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice*, DA-99-1994, rel. September 28, 1999.

[136] Subsequent to the release of the September 28th Public Notice the Commission in the New York 271 proceeding, stated. We do not expect that a BOC, in its initial application, will anticipate and address every foreseeable argument its opponents might make in their subsequent reply comments, but we have previously states that a BOC must address in its initial application all facts that the BOC can reasonable anticipate will be at issue. Through state proceedings, BOCs should be able reasonably to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.

result in the Commission having less than a full record before it when has to rule on this application in just a few weeks.

VI. THE COMMISSION SHOULD REQUIRE THAT THE APPLICATION AND ALL SUPPORTING DOCUMENTS TO BE POSTED ON THE APPLICANT'S WEBSITE

McLeod USA and CapRock note that it is very difficult to adequately review the instant application because so much of what was submitted is not available on SBC's website. In the future, the Commission should require any applicant to place the entire application including all supporting documents, in an easily accessible area of the applicant's website. Simply filing 47 boxes of material at the Commission is not sufficient and puts a significant burden on interested parties. Obviously, many of the persons who might be interested in a Section 271 application will be in the state to which the application applies and will not have the ability to travel to Washington. It would be a very modest burden on the applicant to require the placement of supporting documentation on a website. McLeod USA and CapRock suggest that the Commission require, at a minimum, the placement on the applicant's website of (1) the major State Commission orders or similar documents relative to the application, (2) copies of any relevant documents from the State Attorney General or state consumer advocate; (3) copies of any performance remedy plan or similar plan; (4) attachments to all affidavits; and (5) the statement of generally available terms (SGAT) of interconnection under Section 252 of the Act.

VII. CONCLUSION

For the foregoing reasons, the Commission should deny SBC's Application for Section 271 authority in Oklahoma and Kansas.

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CERTIFICATE OF SERVICE

I, Candise M. Pharr hereby certify that the foregoing Comments of McLeodUSA, Inc. and CapRock Communications, Corp. were filed this 15th day of November, 2000 and copies of same were sent via hand delivery and/or first class mail upon the following:

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